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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

DIAMOND CREEK PARTNERS LTD. et al., Plaintiffs and Appellants, v. CITY OF LINCOLN et al., Defendants and Respondents.	C041050 (Super. Ct. No. SCV10659)

The present action arises from the ongoing efforts of the United Auburn Indian Community (the Tribe) to develop a casino on unincorporated land in Placer County near the City of Lincoln.[1] In September 2000, the City entered into a memorandum of understanding (MOU) with the Tribe providing for the extension of city sewer service to the land on which the Tribe seeks to build the casino. In this mandate proceeding, plaintiffs Diamond Creek Partners, Ltd. (Diamond Creek) and Stephen Des Jardins successfully challenged the MOU on the

[1] Hereafter, we refer to both defendants the City of Lincoln and the Lincoln City Council collectively as the City.

ground the City had failed to conduct an environmental review pursuant to the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.) (CEQA) before approving the MOU. Plaintiffs moved for an award of attorney fees under the "private attorney general" theory (Code Civ. Proc., § 1021.5; hereafter section 1021.5), but the trial court denied the motion on the ground that plaintiffs' "economic interest outweighed the significant benefit conferred on the general public." Plaintiffs appeal from the order denying their attorney fees motion. We will affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Diamond Creek is a limited partnership that owns and develops residential and commercial property in Placer County. Des Jardins is the president of Diamond Equities, Inc., the general partner of Diamond Creek. Des Jardins is also a resident of Roseville and a member of a nonprofit organization known as Citizens for Safer Communities (Citizens), which opposes the Tribe's proposed casino.

In 1997, the Tribe initiated the federal environmental review process that was the first step in acquiring the land for the casino. In the fall of 1999, while that review was still ongoing, the Tribe asked the City to provide sewer service to the casino site. The City elected not to execute an MOU with the Tribe and instead expressed its opposition to the casino.

In January 2000, Placer County entered into an MOU with the Tribe under which the County agreed to support the Tribe's efforts to acquire the land for a casino. In return, the Tribe

agreed, among other things, to provide for sewage disposal on the casino site either by connecting to the City's sewage system, connecting to the County's sewage system, or building its own sewage treatment plant.

In the summer of 2000, after it was notified the Tribe intended to construct its own on-site sewage facilities, the City revisited the issue of providing city sewer service to the site of the proposed casino pursuant to an MOU. Citizens argued in a letter to the City that entering into an MOU with the Tribe would be premature both because the City had not conducted an environmental review under CEQA and because entering into an MOU might minimize the environmental review of the project under federal law, thereby "removing [a] fundamental, publicly beneficial prerequisite to project approval." Despite Citizens' arguments, in August 2000, the City passed a resolution approving the provision of city sewer services to the proposed casino site and authorizing the mayor to execute an MOU with the Tribe.

In September 2000, plaintiffs filed a petition for writ of mandate seeking to set aside the City's resolution until the City complied with CEQA. Plaintiffs contended the City's "[p]rovision of sewer service has obvious significant growth-inducing impacts for the region, as the Tribe's proposed casino project . . . is a reasonably foreseeable consequence of this action." The City demurred to the petition on the ground the Tribe and the owner of the land were indispensable parties that could not be joined, but the trial court concluded otherwise and

overruled the demurrer. Ultimately, the trial court granted the petition, concluding the adoption of the MOU was a "project" subject to environmental review under CEQA. In October 2001, the City complied with the writ of mandate and rescinded the MOU.

Following their success on the merits, plaintiffs filed a motion seeking to recover $55,298.48 in attorney fees and costs under section 1021.5.[2] Although they had alleged in their verified mandate petition that Diamond Creek "is a residential and commercial development venture in the area, that may be adversely affected economically by [the City's] action," plaintiffs asserted in their motion for attorney fees that they "were not vindicating or protecting any private economic interests in bringing this action." Plaintiffs offered no evidence to support this assertion in their moving papers.

In response, the City argued that plaintiffs' primary concern in the action was never the extension of sewer service to the property, but the development of the casino that would follow. The City offered evidence that Diamond Creek owned

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[2] Section 1021.5 provides in relevant part: "Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any."

approximately 101.2 acres of property a short distance from the proposed casino. The City also pointed to a study in the administrative record that concluded the casino would "'be a drag on the local economy,'" draining approximately $20 million from the economy within 10 miles of the casino and approximately $45 million within 30 miles of the casino. The City argued that Diamond Creek's "development opportunities would be harmed by the casino development" and that plaintiffs had failed to carry their burden of showing "that the casino's impact on their property interests does not outweigh [the] cost of litigation."

In reply, plaintiffs offered a declaration from Des Jardins in which he asserted Diamond Creek's property holdings in the area, which once consisted of a 360-acre parcel, were now limited to 28 acres of commercial property fronting Blue Oaks Boulevard and 13 residential lots. Des Jardins then asserted Diamond Creek had sold all of its "residential assets" before the lawsuit and speculated that development of the casino would result in a dramatic increase in traffic on Blue Oaks Boulevard, which "theoretically . . . would actually benefit Diamond Creek properties." (Emphasis deleted.) Des Jardins also asserted neither he nor his partners in Diamond Creek "were motivated to protect our property interests" and they "did not seek any relief that would benefit [their] properties in the slightest."

Plaintiffs also argued the development of the casino was irrelevant since they did not seek any relief that would have jeopardized the casino's development.

The trial court denied the motion for attorney fees, concluding the City "established that [plaintiffs'] economic interest outweighed the significant benefit conferred on the general public." The court went on to express its opinion "that the project was likely to be the best environmental alternative. [The City] simply failed to obtain the technical approval required. This court did not just fall off the turnip truck. [Plaintiffs'] financial interest was clearly the motivating force behind this lawsuit."

Plaintiffs timely appealed from the order denying their motion for attorney fees.

DISCUSSION

"Section 1021.5 codifies the 'private attorney general doctrine' adopted by our Supreme Court in *Serrano v. Priest* (1977) 20 Cal.3d 25 [141 Cal.Rptr. 315, 569 P.2d 1303]. [Citations.] The doctrine is designed to encourage private enforcement of important public rights and to ensure aggrieved citizens access to the judicial process where statutory or constitutional rights have been violated. [Citation.] In determining whether to award attorney fees under section 1021.5 to the 'successful party,' we apply a three-prong test inquiring whether (1) the litigation resulted in the enforcement of an important right affecting the public interest, (2) a significant benefit has been conferred on the general public or a large class of individuals, and (3) the necessity and financial burden of private enforcement renders the award appropriate. [Citations.] Regarding the nature of the public right, it must

be important and cannot involve trivial or peripheral public policies. The significance of the benefit conferred is determined from a realistic assessment of all the relevant surrounding circumstances. As to the necessity and financial burden of private enforcement, an award is appropriate where the cost of the legal victory transcends the claimant's personal interest; in other words, where the burden of pursuing the litigation is out of proportion to the plaintiff's individual stake in the matter." (*Ryan v. California Interscholastic Federation* (2001) 94 Cal.App.4th 1033, 1044.) To justify an award of attorney fees under the "private attorney general" theory, the plaintiffs must establish that the public benefit achieved by the action was "disproportionately important and valuable in comparison to" any personal benefit the plaintiffs achieved for themselves. (*County of Inyo v. City of Los Angeles* (1978) 78 Cal.App.3d 82, 90.)

Here, the trial court found against plaintiffs on the third prong of the test when it concluded plaintiffs' "economic interest [in the outcome of the action] outweighed the significant benefit conferred on the general public."

"The decision whether the claimant has met his burden of proving each of these prerequisites and is thus entitled to an award of attorney fees under section 1021.5 rests within the sound discretion of the trial court and that discretion shall not be disturbed on appeal absent a clear abuse. [Citations.] In other words, an attorney fees award under section 1021.5 will only be reversed where '"it is clearly wrong or has no

reasonable basis."'" (*Ryan v. California Interscholastic Federation*, *supra*, 94 Cal.App.4th at p. 1044.)

Here, plaintiffs contend "the trial court abused its discretion, as there is no reasonable basis for the trial court's decision." As the parties seeking an award of attorney fees under section 1021.5, plaintiffs bore "the burden of establishing that [their] litigation costs transcend[ed] [their] personal interest." (*Beach Colony II v. California Coastal Com.* (1985) 166 Cal.App.3d 106, 113.) It is presumed an award of attorney fees under section 1021.5 is *not* warranted because the cost of the litigation was *not* out of proportion to the plaintiffs' personal interest in the outcome, unless and until the plaintiffs carry their burden of proving otherwise. Furthermore, on appeal the trial court's order is presumed correct, all intendments and presumptions are indulged in favor of its correctness, and the burden of establishing error rests on the appellant. (*In re Marriage of Cochran* (2001) 87 Cal.App.4th 1050, 1056.)

Thus, it is up to plaintiffs to convince us they met their burden of proof below and that the record before the trial court *required* a finding that the cost of the litigation was out of proportion to plaintiffs' personal stake in the litigation compared to the public benefit achieved by the litigation. We are not convinced.

The trial court's finding that plaintiffs had a financial interest in the outcome of this action is eminently reasonable under the circumstances of this case. Diamond Creek is a

developer and Des Jardins is the president of Diamond Creek's general partner. By plaintiffs' own admission, Diamond Creek owns at least 28 acres of commercial property in the vicinity of the proposed casino and some residential property as well. Indeed, the City offered evidence that Diamond Creek owns over 100 acres in the area. In their verified petition, plaintiffs alleged as the basis for Diamond Creek's standing in the action that Diamond Creek "may be adversely affected economically" by the City's action of approving the MOU with the Tribe. The trial court was entitled to take this judicial admission into account in assessing whether plaintiffs had a financial interest in the outcome of the action. Further, the court was entitled to disbelieve plaintiffs' later, contradictory claim that they "were not vindicating or protecting any private economic interests in bringing this action."

The trial court also reasonably could have found that, as a developer of commercial property, Diamond Creek has a financial interest in drawing businesses into the area to purchase or lease the commercial space Diamond Creek is developing. There is evidence the presence of a casino would have an adverse impact on Diamond Creek's ability to develop its commercial property. In the report in which he concluded the proposed casino would "'be a drag on'" the local economy, Dr. William N. Thompson opined that "many businesses that are considering coming into the area may and must reexamine their site selection activity and consider the inappropriateness of locating very very close to a casino." Dr. Thompson further wrote that "[a]

casino will make it more difficult for the cities [surrounding the proposed casino site] to attract new high tech businesses, and for existing companies to recruit and retain the talent needed to be competitive."

Plaintiffs argue that "whatever impact the casino project may or may not have on [their] property is irrelevant" because their "lawsuit had no impact on the Tribe's project." According to plaintiffs, the City's "illegal maneuver to extend wastewater service without proper CEQA review had nothing to do with the completion of the Tribe's casino project other than the fact that wastewater service would be provided by the City."

Plaintiffs' argument is belied by the letter Citizens sent to the City in opposition to the MOU, which was prepared at Des Jardins's request. In that letter, Citizens pointed out that the Bureau of Indian Affairs (BIA) was still in the process of reviewing the Tribe's proposed acquisition of the land under federal environmental laws. Citizens noted the possibility the BIA might conclude as a result of its environmental review that the proposed site of the casino was "an inappropriate location for a gambling facility." According to Citizens, the Tribe had submitted an environmental assessment to the BIA "which the Tribe hopes will fulfill its obligations for environmental review of the gambling facility under" federal law. Citizens contended, however, that the BIA would have to prepare an environmental impact statement because there were "'substantial questions' about whether impacts from the proposed casino's on-site wastewater plant are significant" and "because sewer and

wastewater impacts of the gaming facility are 'highly controversial' in the sense that experts disagree as to their nature and extent." Citizens concluded that "[b]y urging the City to enter into an MOU, the Tribe is attempting to take these significant impacts off the table, hoping to minimize the extent of the BIA's environmental review of the project required under [federal law]. It is unclear to [Citizens] why the City would consider needlessly removing this fundamental, publicly beneficial prerequisite to project approval by prematurely entering into an MOU for a proposal that the City truly prefers not to approve."

It reasonably appears from Citizens' letter that casino opponents feared the City's approval of the sewer service MOU would facilitate and expedite the approval of the casino project by federal officials. Even if requiring the City to perform an environmental review under CEQA before approving the MOU might not have ultimately stopped the casino, it was nonetheless reasonable for the trial court to conclude that plaintiffs' challenge to the MOU was another means of opposing the casino, which served the financial interests of plaintiffs as developers of commercial property in the region.

Plaintiffs contend that "[e]ven if the casino project was relevant . . . Des Jardins declared that the casino project would actually benefit [plaintiffs] because the casino project would bring additional traffic by the commercial development property." However, Des Jardins failed to offer any basis for his opinion that Diamond Creek's commercial property on Blue

Oaks Boulevard "would receive a dramatic increase in traffic, should the casino be developed."[3] Des Jardins also admitted he was speculating about the beneficial impact of the casino when he said that "*theoretically*, more traffic on Blue Oaks Boulevard would actually *benefit* Diamond Creek properties." (First italics added.) The trial court was under no obligation to believe Des Jardins's self-serving testimony.

Based on the foregoing considerations, it was reasonable for the trial court to find plaintiffs had a financial interest in the outcome of this action. For the reasons set forth below, it was also reasonable for the court to find that plaintiffs' financial interest outweighed the public benefit the action achieved and that the cost of the litigation did not transcend plaintiffs' personal stake in the matter.

This action benefited the public because it required the City to comply with CEQA before agreeing to provide sewer services to the site of the Tribe's proposed casino. The trial court specifically found this was "a significant benefit conferred on the general public," thus satisfying the second prong of the test under section 1021.5. Nevertheless, the trial court also found "the project," i.e., the provision of city sewer service to the proposed casino, "was likely to be the best environmental alternative" and that the City "simply failed to

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[3] Indeed, a traffic impact study of the proposed casino in the administrative record suggests little or no increase in traffic on Blue Oaks Boulevard due to the presence of the casino.

obtain the technical approval required." Thus, while the court found requiring the City to comply with CEQA before entering into an MOU with the Tribe was a significant public benefit, the court also found the ultimate result likely would not be different, and the City likely would end up offering to provide sewer service to the casino site anyway following CEQA review. Under these circumstances, the trial court reasonably could have determined that the public benefit achieved by the action was not so "disproportionately important and valuable in comparison to" the personal benefit plaintiffs achieved for themselves as to justify an award of attorney fees under section 1021.5. (*County of Inyo v. City of Los Angeles*, *supra*, 78 Cal.App.3d at p. 90.)

Furthermore, as the City points out, the Tribe has the ability to construct a sewage treatment plant of its own, which will not be subject to any CEQA review at all. If this happens, then the public benefit achieved by plaintiffs' action -- requiring the City to comply with CEQA before providing sewer service to the proposed casino site -- will be illusory. Again, under these circumstances, it was reasonable for the trial court to find plaintiffs' personal, financial stake in the litigation outweighed the public benefit achieved.

For the foregoing reasons, we conclude the trial court did not abuse its discretion in denying plaintiffs' motion for attorney fees under section 1021.5.

CONCLUSION

The order denying plaintiffs' motion for attorney fees is affirmed. Defendants to recover their costs on appeal. (Cal. Rules of Court, rule 26(a)(1).)

ROBIE, J.

We concur:

RAYE, Acting P.J.

MORRISON, J.